(1) No.

Supreme Court, U.S.
FILED

In The 95 • 990 DEC 20 1995

Supreme Court of the United States

October Term, 1995

ROLAND A. JONES,

Petitioner,

vs.

SECRETARY OF THE ARMY, et. al.

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED

I. Whether this Court's *Celotex Corp. v. Catrett*, 477 U. S. 317 (1986) permits lower courts, by summary judgment, to adjudicate fewer than all claims and terminate the action as to the claims, where:

(a) the lower courts have completely ignored the issue of the 1979 and 1980l Lieutenant Colonel (RA) Promotion Boards being "inherently tainted" by promotion passover letters leftover from the illegal 1974 and 1975 promotion boards, and where

(b) the lower courts did not apply: (1) two (2) ABCMR admissions of guilt, and (2) the law (10 U.S.C. 1552 and its implementing regulations 32 CFR 581.3 and Army Regulation 15-185)?

II. Whether the 11th Circuit Court of Appeals' decision is in conflict with this Court's *Chappell v. Wallace*, 462 U.S. 462, at 303, where:

(a) *Chappell, Orloff v. Willoughby*, 345 U.S. 83, 91 (1953), and *U. S v. Stanley*, U. S. , 107 S.Ct. 3054, 97 L.Ed. 550 (1987) have severely restricted the judicial relief available to military personnel to where there is no relief, at all, available in the 11th Circuit,

(b) *Chappell's* descendants have decided contrary to the court of appeals on the same matter,

(c) the district court and the court of appeals (Apps. B, p. 10a; C, p. 13a; E, p. 20a), except for the federal magistrate (App. D, p. 15a), have refused to even recognize this Court's *Chappell* as binding on the 11th Circuit?

LIST OF PARTIES

A list of parties to the proceeding in the court those judgment is the subject of this petition is as follows:

Roland A. Jones Permanent Major, Regular Army (Retired) Temporary Lieutenant Colonel (AUS) (Retired)	Petitioner
The Secretary of the Army	Respondent
The Department of the Army	Respondent
The Army Board for Correction of Military Records	Respondent
The Total Army Personnel Agency, a.k.a. Military Personnel Center/MILPERCEN	Respondent
Mr. John W. Matthews Executive Secretary of the ABCMR. When case was filed, the Deputy Assistant Secretary, Department of the Army for DA Review Boards, Personnel Security, and Equal Employment Opportunity Complaints, and Complaint Review.	Respondent
Mr. Karl Bielenberg Executive Secretary of the ABCMR. After case was filed, Chief of Information Management, the U. S. Army, Corps of Engineers.	Respondent

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Petitioner Roland A. Jones, *pro se*, respectfully prays that a writ of certiorari be issued to review the *per curiam* judgment and opinions of the United States Court of Appeals for the Eleventh Circuit issued in the above proceeding.

OPINIONS BELOW

There is no reported Army Board for Correction of Military Records ("ABCMR") Memorandum of Consideration ("MOC") for my 1975-76 applications. ABCMR July 28, 1976, MOC for "Relook" board" selections to temporary Lieutenant Colonel (AUS) (App. A1, p. 1a, A2, p. 6a, and L, p. 42a).

The first opinion of the court of appeals is "unpublished", and is at App. B, p. 10a. The second court of appeals' opinion is "unpublished", and is at App. C, p. 13a. The Magistrates Report and Recommendation is at App. D, p. 15a. The district court's summary judgment order is App. E, p. 20a.

STATEMENT OF JURISDICTION

In addition to the decision of the court of appeals being in conflict with decisions of other courts, this case presents a special jurisdictional problem created by the Supreme Court, and only the Supreme Court, as the court of last resort, can fix. This Court's *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953), *Chappell v. Wallace*, 462 U.S. 296 (1983), at 303, and *U. S v. Stanley*, U. S. , 107 S.Ct. 3054, 97 L.Ed. 550 (1987) severely restricts the judicial relief available to military personnel, and commands jurisdiction for all such relief to the ABCMR, under 10 U.S.C. 1552.

However, this Court's ABCMR 10 U.S.C 1552 relief was made unavailable to me by the nondiscretionary action of Mr. John W. Matthews, Deputy Assistant Secretary of the Army, when he ordered me out of the ABCMR's 10 U.S.C. 1552 jurisdiction, by stating:

> "I specifically reject any offer you might be trying to convey . . . your recourse is to a federal court of competent jurisdiction." (App. F, p. 25a).

ABCMR 10 U.S.C. 1552 relief was also made unavailable to me in the district court and in the 11th Circuit Court of Appeals when they refused to apply, or even recognize this Court's *Chappell* as binding on the 11th Circuit.

A special jurisdiction consideration for pro se complaints, such as this, is invoked by this Court's *Hains v. Kerner*, 404 U.S. 519 520-21, 92 S.Ct 594, 595-96, 30 L.eD.2d 652, 1972, quoting *Conely v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d. 80, 1957, reaff. in *Estelle*, 429 U.S. at 99, 106, 97 S.Ct. at 29:

> "Allegations of a pro se complaint. . . should be held to less stringent standards than formal pleadings drafted by lawyers." See also *Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984); *Huges v. Rowe*, 449 U. S. 5, 9, 101 S.Ct. 173, 66 L.Ed2d 163 1980 (per curiam), quoting *Hains v. Kerner*, 404 U. S. 519, 520, 92 S.Ct. 594 595, 30 L.Ed. 2d 652 (1972); *Hohman v. Hogan*, 597 F.2d 490 (2d Cir 1979),

and this Court's *Hughes v. Rowe*, U. S. 449, per curiam, at 9, 1980, where

> "an unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims".

A judgment date of July 31, 1995, was not provided to me by the court of appeals until October 26, 1995, (App. G, p. 26a-27a). Pursuant to this Court's Rule 13, my petition for rehearing was denied on September 29, 1995 (App. H, p. 29a). Based on this date, my 90 days starts to run from September 29, 1995. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1). Jurisdiction in the district court was invoked under 28 U.S.C. 1345.

STATUTORY PROVISIONS INVOLVED

This case involves 10 U. S. C. 1552 and its implementing regulations 32 CFR 581.3(b)(1)(ii)(2) and (3), and Section II, 4 and 5, Army Regulation ("AR") 15-185, as they provide "the function of the Board is to consider all applications properly before it for the purpose of determining the existence of an error or an injustice", and "the Board will have jurisdiction to review and determine all matters properly brought before it consistent with existing law".

And, 10 U. S. C. 1552 , pursuant to *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979), and 627 F.2d 407 (D.C. Cir. 1980), as it provides that the 1976 "Relook Board", for me and twenty-three (23) other RA officers (App. A1, p. 4a) was illegal, and corrective action due, by the removal of passover letters (App. J,

p. 35a, and K, p. 37a) left over from 1974 and 1975 illegal promotion boards, was not provided by the ABCMR.

STATEMENT OF THE CASE

My case was predisposed/doomed from the outset when the ABCMR argued on June 6, 1988, based on this Court's *Orloff* (1953):

> "Judges are not given the task of running the Army. . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters. . ."

A writ of certiorari is requested in this case to allow this Court to review the court of appeals' opinions (Apps. B and C), because this Court's *Orloff* (1953), *Chappell* (1983) , and *U. S v. Stanley*, (1987) have severely restricted the judicial relief available to military personnel, to the extent that there is no relief, at all, available in the 11th Circuit, even under this Court's *Chappell*, at 303 .

Except for Federal Magistrate, John E. Dougherty (App. D, p. 15a), the district court (App. E, p. 20a) and the 11th Circuit Court of Appeals (Apps. B, p. 10a and C, p. 13a) do not consider this Court's *Chappell* as binding on the 11th Circuit; nor do they consider the descendants of *Chappell* (*Skinner v. U.S.*, 594 F.2d 824, 1979, at 830, *Baxter v. Claytor*, 652 F.2d 181 at 185, and *Marcotte v. Secretary of Defense*, 618 F.Supp. 756, 763, D.C. Kan. 1985) to be binding or considered by the 11th Circuit; nor do they consider the D.C. Circuit's *Dilley and Sanders v. U. S.*, 594 F.2d 804 at 819 (1979), at

818 on removing passover letters (App. J, p. 35a, and K, p. 37a) from my records to be binding on the 11th Circuit.

The court of appeals has also rendered its decisions in conflict with the decisions of other courts of appeal, on the same matter, regarding the ABCMR's failing to act during 1975-76, and regarding the ABCMR's failing to remove passover letters (App. J, p. 35a, and K, p. 37a) from my record, per *Dilley*. And, the court of appeals decision is in conflict with this Court's *Celotex Corp. v. Catrett*, 477 U. S. 317 (1986), 325 on summary judgments. A brief summary of the background facts and the proceedings follows:

I
Summary

The ABCMR's motion for summary judgment short circuited the process, creating a loss of substantial justice. In retirement, I hold the U. S. Army rank of permanent Major, Regular Army ("RA"), and the temporary of Lieutenant Colonel, Army of the United States ("AUS"). I was forced to retire on October 1, 1990 (App. K2, p. 39a), at the temporary rank of Lieutenant Colonel (AUS), because I was not promoted in 1979 and 1980 from my permanent rank of Major (RA) to permanent Lieutenant Colonel (RA).

But for my 1979 and 1980 RA promotion boards being "inherently tainted" by 1974 and 1975 promotion passover letters leftover in my record, and discrimination in my Officer Evaluation Report (OER) scores found by the Army's "Butler Study" (App. I, p. 30a), I would not have been forced to retire (App. K2, p. 39a), and could have retired at a much higher rank than Lieutenant Colonel (AUS):

a.

On Two (2) Occasions The ABCMR Should Have Automatically Removed The Promotion Passover Letters For 1974 And 1975; The ABCMR Has Never Explained Why The 1974 And 1975 Passover Letters Are Still In My Record, While The 1979 And 1980 Passover Letters Are Not.

In 1974 and 1975 I was passed over for promotion to temporary Lieutenant Colonel (AUS), and passover letters were placed in my record. On January 28, 1976, the ABCMR declared the 1974 and 1974 promotion boards to be illegal (App. A2, p. 7a3), and on July 28, 1976 the ABCMR's "Relook" board promoted placed me on the promotion list for promotion (App. A1, p. 1a; L, p. 44a; L2, p. 44a). On September 16, 1976, I was notified that my records had been corrected to show that I had been "promoted to the temporary grade of Lieutenant Colonel by the ABCMR "Relook" (App. L2, p. 44a). In 1979 and again in 1980 *Dilley* declared my 1976 Relook Board to be an ends-justifying-the-means procedure that permitted the Army to violate its governing statutes, at will, and then determine for itself whether the violation made any difference, and mandated the passover letters be removed.

Since, on January 28, 1976 the ABCMR declared the 1974 and 1975 promotion boards to be illegal (App. A2, p. 6a) --- it legally follows that the 1974 and 1975 passover letters (App. J, p. 35a, and K, p. 37a) are also illegal, and should have been automatically removed by the ABCMR; since *Dilley* and *Sanders* held that passover letters are illegal and must be removed --- it legally follows that my 1974 and 1975 should have been, again, automatically removed by the ABCMR;

since on two (2) occasions my 1974 and 1975 passover letters were not removed --- it reasonably follows that my 1979 and 1980 Lieutenant Colonel (RA) Promotion Boards were, as the ABCMR put it (App. M, p. 49a), "inherently tainted" by the 1974 and 1975 passover letters; and since my forced retirement (App. K2, p. 39a) resulted from these promotion boards --- it reasonably follows that my retirement is "inherently tainted" by the 1974 and 1975 passover letters in my record.

The ABCMR's failure to automatically remove the passover letters, in and of itself, implicates a loss of substantial justice for petitioner and for twenty two (22) other RA officers (App. A1, p. 4a), who might be similarly situated, but just don't know it yet. The district court and the court of appeals did not adjudicate this passover letters issue.

b.

On Two (2) Occasions The ABCMR Admitted It Did Not Act On The Discrimination In My OERs During 1975-76

Since 1974 I have attempted to get the Army's Military Personnel Center ("MILPERCEN") and the ABCMR to correct the discrimination identified by the Army's "Butler Study" (App. I, p. 30a) in my Officer Evaluation Reports ("OER"). On two (2) occasions the ABCMR has admitted/acknowledge that it did not act on my applications for the correction of my records during 1975-76. Since the ABCMR admitted two (2) times that it did not act to remove the discrimination from my OERs during 1976-75 --- it reasonably follows the ABCMR failure to act was arbitrary and capricious, and in violation of 10 U. S. C. 1552 and its implementing regulations. The district

court and the court of appeals did not adjudicate the ABCMR admissions/acknowledgments that it did not act, and did not apply this Court's arbitrary and capricious standard from this Court's *Chappell* to the ABCMR's admissions of guilt.

II.
The 1974 And 1975 Passover Letters "Inherently Tainted" My 1979 And 1980 Promotion Boards.

After my nonselection for temporary promotion to Lieutenant Colonel (AUS) by the 1974 and 1975 promotion boards, an action was filed by Douglas Maxwell, founder of the Promotion Research Committee ("PRC"), claiming the Army's promotion process was being operated illegally, including that the 1974 and 1975 promotion boards were illegally constituted. On January 26, 1976, the Army announced (App. A2, p. 7a3) that it had acted illegally when it illegally constituted the 1974 and 1976 Lieutenant Colonel (AUS) promotion boards for 1974 and 1975. On July 28, 1976, twenty-three Regular Army (RA) officers, including petitioner, and five Reserve (USAR) officers, were promoted by an ABCMR "Relook" board to temporary Lieutenant Colonel (App. A1, p. 2a, b).

After the 1976 "Relook" board, a series of claims were filed by Raymond W. Fontaine, Micheal F. *Dilley*, Russell F. Powell, Milton D. O'Quinn, among others, essentially claiming that the 1976 "Relook" board was unfair because it intentionally promoted Regular Army officers over Reserve officers, and that the 1976 "Relook" board applied passover letters from promotion boards prior to the 1976 "Relook" board against the Reserve Officers.

In 1979 and 1980, the ABCMR's 1976 "Relook" board was declared to be illegal by *Dilley*. In *Dilley* the D.C. Circuit mandated that:

> "The Corrections Board's decision to recommend the Relook Boards similarly amplifies the Army's attitude . . . This ends-justifying-the-means procedure is inconsistent . . . for it would permit the Army to violate its governing statutes at will and then determine for itself whether the violation made any difference . . . all records, including those reflecting nonselection by the promotion selection boards, be corrected to put appellants in the position they would have occupied had the Army not engaged in its unlawful selection procedure . . . they should not contain any adverse reference to the passing over . . . This error was not insignificant, for the promotion prospects of an officer already once `passed over' by a selection board are narrow". *Dilley*, supra.

After the *Dilley* decision, the ABCMR went back and removed the passover letters for the Reserve officers, reinstated them to active duty, and awarded them back pay. The Secretary of the Army, through his ABCMR, should have also automatically removed my passover letters for 1974 and 1975, since my 1974, 1975, and 1976 Relook boards were declared illegal (App. A1, p. 1a, A2, p. 6a and *Dilley*), and since the passover letters for my 1979 and 1980 nonselections for promotions to permanent Lieutenant Colonel (RA) were automatically removed, and currently do not

appear in my record. The ABCMR has never explained (App. F, p. 25a) why the 1974 and 1975 passover letters (App. J, p. 35a, and K, p. 37a) are still in my record, while the 1979 and 1980 passover letters are not.

These leftover 1974 and 1975 passover letters "inherently tainted" my 1979 and 1980 promotion boards for promotion to permanent Lieutenant Colonel (RA), which resulted in my forced retirement (App. K2, p. 39a), the same way as argued by the ABCMR (App. M, p. 49a):

> "The plaintiffs' were "passed over" for a second time, arguably because the 1976 board considered the fact that the plaintiffs had already been previously passed over. . . The court further decided that the second promotion board in 1976 was inherently tainted."

III

The ABCMR Has Never Acted To Add Precise Credit To Correct The Discrimination Found In African-American OER Scores By The Army's "Butler Study" During 1975-76.

On July 31, 1975, The Department of the Army released the conclusions of its "Butler Study" (App. I, p. 30a). The study concluded that discrimination had been found to be in African-American Officer Evaluation Reports ("OER") from December 1956 to December 1971, and during the period January 1, 1973 to June 1975:

"A recurring phenomenon revealed by the study is that a significantly larger percentage of black officers received scores on the lower end of the OER spectrum than did white officers . . . a large part of the disparity was the result of a variety of forms of discriminating practices and outlook. . . occurring within the Army". (App. I, p. 31a5 and 33a9).

* * *

"Army managers may take relatively precise corrective action where disparities in treatment are identified". (App. I, p. 33a10).

Other comments reported in the *Army Times* Newspaper related to the Army's "Butler Study":

"in fact, as a group black officers are better educated than whites but they are still getting career stymieing efficiency reports . . . the down rating of blacks has had a particular damaging effect on the current group of black field grade officers."

****

"When Army personnel chief Lt. Gen. Bernard W. Rogers was briefed on the report in July, he reportedly called it `political dynamite' ".

Pursuant to the above announced "army managers may take relatively precise corrective action where disparities in treatment are identified", during 1975

administrative procedures were pursued with the MILPERCEN to add a credit of up to 25 points to my OERs identified for 1959 (year of my entry into military service) to 1975. Upon the completion of the unsuccessful MILPERCEN administrative procedures, several applications were filed with the ABCMR to correct OER discrimination defects.

The issue is not whether I submitted additional application to the ABCMR in 1982 with many different claims than those submitted during 1975-76, but rather did the ABCMR fail to act during 1975-76 on my "Butler Study" claims to add "precise" credit to my Officer Evaluation Reports ("OER") to correct the discrimination found to be in African-American OERs from 1959-1972 by the Army's "Butler Study " (App. I, p. 33a10); and whether I could have sustained prejudice before my 1979 and 1980 promotion boards because the ABCMR did not act.

IV
The ABCMR In A Highly Suspicious Move, Ordered Me Out Of The ABCMR System, Contrary To This Court's *Chappell* At 303.

Pursuant to Section VII, Settlement of Claims, AR 15-185, which provides:

> "The Department of the Army is authorized to pay claims in accordance with Section 1552, Title 10, United states Code (para 2) . . . such claim for settlement and payment may be filed as a separate part of the application for the correction of the record. . . settlement of claims will be based on the decision of the Secretary of the Army".

A proposal of settlement was made to the ABCMR. However, Mr. John W. Matthews, Deputy Assistant Secretary, Department of the Army, mysteriously, illegally, and for motives known only to Mr. Matthews, foreclosed on the remedies that could be provided by the ABCMR under 10 U.S.C. 1552 by ordering me out of the ABCMR's 10 U.S.C. 1552 system, into federal court, on February 28, 1985:

> "I specifically reject any offer you might be trying to convey . . . your recourse is to a federal court of competent jurisdiction." (App. F, p. 25a).

V
Proceedings In District Court And Court Of Appeals

In district court and the court of appeals I contended that the Army's "Butler Study" found discrimination in my OER scores; that applications to correct the discrimination were filed with the ABCMR during 1975-76; that in violation of 10 U.S.C. 1552, and its implementing regulations, the ABCMR failed to act during 1975-76 to correct the discrimination in my OERs; that the ABCMR admitted it did not act to correct the discrimination in my OERs; that the ABCMR did not act to remove the passover letters from my record; that these ABCMR failures combined to cause an adverse impact on my selection for promotion from permanent Major (RA) to permanent Lieutenant Colonel (RA) in 1979 and 1980, and forced the Army to retire (App. K2, p. 39a) me on October 1, 1980 (App. K2, p. 39a), because I was a two (2) time passover for Lieutenant Colonel (RA); that my retirement pay is fixed at the rank of "temporary" Lieutenant Colonel (AUS), at 1980 rates, when it should be based on a rank I could have achieved (as

high as general officer, pay grade O-10), had the ABCMR not acted illegally; and that Mr. John W. Matthews and the other civilian defendants, conspired to cover-up the ABCMR's failures to act, specifically on June 4, 1990, the district court was advised:

> "Mr. Matthews and Mr. Bielenberg engaged in a deliberate effort to avoid the truth that the ABCMR did not act in 1974, 1975, or 1976."
>
> "They engaged in a deliberate effort to hide the fact that *Dilley* had mandated that retroactive corrections be made to the record."

The magistrate had recommended:

> "Plaintiff . . . and shows that it has been held under 10 U.S.C. 1552 that discretionary practices by the ABCMR are . . . impermissible the magistrate is persuaded by plaintiff's argument and the argument in *Baxter v. Claytor*. . .", (App. D, p. 16a and 17a).

The district court found:

> ". . .documentation provided by plaintiff suggests that only plaintiff's 1975 `applications' were properly submitted to and were, in fact, received by the ABCMR. According to a April 19, 1976, letter from the Inspector General's Office, plaintiff's March 18, 1976, Inspector General Action Request was

> forwarded to the ABCMR for consideration . . . The Court must assume. . .that the Request was sent to and received by the ABCMR". (App. E, p. 22a).

The ABCMR twice admitted its guilt of not acting:

> June 4, 1990: "there was never a board constituted in the 1970's which reviewed plaintiff's record.. .the plaintiff's records were never reviewed by the ABCMR board in the listed years." (App. N, p. 50a and 51a).

> April 11, 1991: "Additionally, it is equally plausible that the ABCMR did not respond or act upon plaintiff's...because the plaintiff had not completed the exhaustion of his administrative remedies." (App. M, 47a),

Though I vigorously disputed, without applying the law, the ABCMR's admissions of guilt, and this Court's arbitrary and capricious standard from *Chappell*, the district court's summary judgment mysteriously held:

> "at the outset it appears the undisputed facts indicate that the ABCMR acted upon the aforementioned 1975 and 1976 'applications' in a manner consistent with its regulations. . .It is clear, in any event, that even if the ABCMR did not act upon these applications, the ABCMR's failure to act -the violations

> of its regulations - was not `prejudicial' to plaintiff". (App. E, p. 22a),

Had the district court applied the aforementioned factual and legal factors, the above conclusion would have been different. The court of appeals mysteriously affirmed the defective district court conclusion:

> "Appellant also contends that the ABCMR failed to act on the applications he made, in 1975 and 1976, to correct his records. As the district court observed, appellant reiterated the complaints made in these applications in the applications for the correction of records he made in 1983-1985, and these complaints were properly addressed at that time. Accordingly, appellant could have sustained no prejudice from the ABCMR's failure to act on his 1975 and 1976 applications and denial of judicial relief was appropriate". (App. B, p. 12a)

On a second appeal, again without applying the aforementioned, the court of appeals mysteriously reaffirmed the district court's defective conclusion:

> "we said that `ABCMR's actions on Appellant's applications for correction of records were . . . appropriate. . .". (App. C, p. 14a).

The district court and the court of appeals completely ignored my issues of the passover/*Dilley* matter, and my Mr. Matthews and Mr. Bielenberg conspiracy to cover-up.

REASONS FOR GRANTING THE WRIT

The summary judgment and the decisions of the 11th Circuit Court of Appeals, in this case, adjudicated fewer than all claims, and the decisions of the 11th Circuit Court of Appeals are in direct conflict with a prior decision of this Court and with prior decisions of other courts of appeals governing claims military claims brought under 10 U.S.C. 1552. The questions raised in this petition are of great importance to the bench and *pro se* military litigants in the 11th Circuit.

I
THE COURT OF APPEALS ADJUDICATED FEWER THAN ALL CLAIMS

The district court's summary judgment and the court of appeals adjudicated fewer than all of my claims, contrary to this Court's *Chappell* and *Chappell's* descendants (morefully shown below), and contrary to the court of appeals' *Williams v. Bishop*, 732 F.2d 885 (11th Cir. 1984) and the general rule that:

> [A]ny order or other form of decision, however, designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims.

a.

As shown earlier (see Summary a, p. 6), on two (2) occasions the ABCMR should have automatically removed the promotion passover letters for 1974 and 1975 from my record. My 1979 and 1980 promotion boards were "inherently tainted" by the passover letters left over in my record from 1974 and 1875, the

same way as argued by ABCMR at App. M, p. 49a:

> "The plaintiffs' were "passed over" for a second time, arguably because the 1976 board considered the fact that the plaintiffs had already been previously passed over. . . The court further decided that the second promotion board in 1976 was inherently tainted by the inclusion of any mention of a first passover because of the illegality of the first board."

The orders of the district court and the court of appeals do not show that my passover letters issue, pursuant to *Dilley*, was adjudicated. The orders of the district court and the court of appeals do not even show a reference to *Dilley* and *Sanders* at 819:

> "The Corrections Board's decision to recommend the Relook Boards similarly amplifies the Army's attitude . . . This ends-justifying-the-means procedure is inconsistent . . . for it would permit the Army to violate its governing statutes at will and then determine for itself whether the violation made any difference . . . all records, including those reflecting nonselection by the promotion selection boards, be corrected to put appellants in the position they would have occupied had the Army not engaged in its unlawful selection procedure . . . they should not contain any adverse reference to the passing over . . . This error was not

> prospects of an officer already once 'passed over' by a selection board are narrow".

See also *Sanders* at 818 where it is held:

> ". . .His troubles were also impacted by previous passover(s) for promotion."
>
> ****
>
> "...passovers should have been removed . . . so that he could have a clean slate for selection board consideration on a 'fair and equitable basis. Not to do this was both legal error and an injustice to plaintiff because it was arbitrary, capricious decision, and an abuse of discretion..."

b.

As shown earlier (see Summary b, p. 7), on two (2) occasions the ABCMR admitted it did not act on the discrimination in my OERs during 1975-76. The district court's summary judgment and the court of appeals did not adjudicate the ABCMR's failure to act on my applications during 1975-76 because the orders do not show that the law (10 U. S. C. 1552 and its implementing regulations 32 CFR 581.3(b)(1)(ii)(2) and (3), and Section II, 4 and 5, AR 15-185) was applied:

> "the function of the Board is to consider all applications properly before it for the purpose of determining the existence of an error or an injustice",
>
> ****

> "the Board will have jurisdiction to review and determine all matters properly brought before it consistent with existing law".

c.

The orders of the district court and the court of appeals do not show an application of the law 10 U.S.C. 1552), the ABCMR's admissions of guilt, this Court's arbitrary and capricious standard from *Chappell* at 303, and whether these missing factors had an impact on the summary judgment.

d.

The orders do not show that the district court and the court of appeals adjudicated whether Mr. Matthews and Mr. Bielenberg, by the action at App. F, p. 25a, engaged in a conspiracy to avoid the fact that the ABCMR did not act in during 1975-76, and to hide the fact that *Dilley* had mandated that retroactive corrections be made to the record.

II

THE COURT OF APPEALS' DECISION NOT TO ACT DURING 1975-76 IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND OTHER APPEALS COURTS ON THE SAME MATTER.

The decision of the court of appeals is in conflict with this Court's *Chappell* at 303, and its descendants on the same matter:

> "Under the Board's procedure, one aggrieved . . . may request a hearing; if the claims are denied without a hearing,

the Board is required to provide a statement of its reasons. 32 C.F.R. 723.3(e)(2), (4), (5), 723.4, 723.5 (1982). The Board is empowered to order retroactive back pay and retroactive promotion. 10 U.S.C. 1552(c). Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence. See *Grieg v. United States*, 226 Ct. Cl. 258, 640 F.2d 1261 (1981), cert. denied 455 U.S. 907 (1982); *Sanders v. United States*, 219 Ct. Cl. 285, 594 F.2d 804 (1979).

****

"Defendants errors were compounded when the Correction Board did absolutely nothing . . . when it could have. "*Skinner v. U.S.*, 594 F.2d 824, 1979, at 830.

****

". . .the Board has a nondiscretionary, judicially enforceable, duty to exercise this power to correct such records. . . We therefore hold that the Board erred in failing to perform a nondiscretionary duty..." *Baxter v Claytor*, 652 F.2d 181,185.

****

"The conduct of the Corrections Board in filing *Marcotte's* second application without action is arbitrary and capricious and shall be overturned. . . The Corrections Board, by failing to consider or address the merits of

Marcotte's application, failed to exercise its discretion." *Marcotte v. Secretary of Defense*, 618 F.Supp. 756, 763, D.C. Kan. 1985).

III

THE COURT OF APPEALS DECISION IS IN CONFLICT WITH THIS COURT'S SUMMARY JUDGMENT PURSUANT TO *CELOTEX CORP. V. CATRETT.*

The court of appeals decisions are in conflict with this Court's *Celotex Corp. v. Catrett*, 477 U. S. 317 (1986), 325, where it was not demonstrated by the ABCMR that "there is no genuine issue as to any material fact . . . and the moving party (ABCMR) is entitled to judgment as a matter of law.

In *Celotex* this Court held that this burden could only be met if the moving party demonstrates "that there is an absence of evidence to support the non- moving party's case." In *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988) the court of appeals provides that on motion for summary judgment courts must construe the evidence and all inferences drawn from the evidence in the light most favorable to the non-moving party. The ABCMR did not demonstrate there was no issue as to any material fact and that there was an absence of evidence to support my claims that the ABCMR had failed to act on my applications for 1975-76, and that the 1974 and 1975 passover letters were not still in my record.

CONCLUSION

This Court being the Court of last resort, I request that the Court VACATE the decisions of the court of

appeals affirming summary judgment; that the failure to act during 1975-76 be held as arbitrary and capricious, per this Court's *Chappell* and its progenies on the same matter; that the ABCMR be directed to remove the passover letters from my record, per *Dilley* and *Sanders*; that the ABCMR be directed to promote me to permanent Lieutenant Colonel (RA), retroactive to the permanent Lieutenant Colonel Promotion Board of 1979; the ABCMR be directed to vacate my forced retirement (App. K2, p. 39a) of October 1, 1980; the ABCMR be directed to reinstate me to active duty, retroactive to October 1, 1980; that the ABCMR be directed to retroactive promote me to all to the other higher ranks (as high as general officer, pay grade 0-10) that could have been achieved had I not been forced to retire on October 1, 1980; and that the ABCMR award retroactive back-pay, to include retroactive payment for the loss all allowances for accumulated leave, subsistence, and quarters for all retroactive ranks retroactively promoted.

Since I can only represent myself, that this Court act on behalf of the other officers at App. A, p. 4a and direct the ABCMR to determine if they are similarly situated with 1974, 1975 passover letters still in their records. If similarly situated, that the ABCMR notify them that they may be entitled to corrective action the same as they were initially notified at App. L, p. 42a.

Respectfully submitted,
Roland A. Jones, pro se
Major (RA), U. S. Army (Retired)
1390 Heatherland Dr.
Atlanta, Georgia 30331
(404) 344-1332

APPENDIX A1-- ILLEGAL 1976 ABCMR RELOOK PROMOTION.

DEPARTMENT OF THE ARMY
ARMY BOARD FOR CORRECTION OF MILITARY RECORDS
PROCEEDINGS

IN THE CASE OF: **28 July 1976**
RICHARD H. BARRATT
520-42-5024, et al

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for correction of Military Records in the case of the above-named individual and others. A quorum was present during the hearing and deliberation. The following findings, conclusions and recommendations were adopted by the Board.

Applicants request correction of military records as stated in applications to the Board and restated herein.

The board convened at the call of the Chairman on the above date and, following consideration of the cases and having made its determination thereof, proceeded to other business.

Present:	Mr. Gordon M. Hobbs	Chairman
	Mr. Oliver Kennedy	Member
	Mr. Charles R. Woodside	Member
	Mr. James C. Hise	Member
	Mr. James L. Stroud	Member
	Mr. Raymond J. Williams	Executive Secretary

Mr. E. E. Wilmeth Examiner

The Board considered the following evidence:

Exhibit A - Applications for correction of military records.
Exhibit B -10 December 1975 ABCMR Board Proceedings.
Exhibit C -28 January 1976 Secretary of Army decision.

THE BOARD FINDS:

a. that the applicants request correction of their military records to show that they were promoted to lieutenant colonel (LTC), Army of the United States (AUS), as if they had been selected by the 1974 AUS, Amy Promotion List (APL), Chaplain (Cli), and 14omen's Army Corps (WAC) promotion selection board;

b. that twenty-three of the applicants are Regular Army (RA) officers, and five are Reserve (USAR) officers, who failed to be selected for promotion to the next higher temporary grade by the 1974 AUS promotion selection board; that the twenty-three RA officers and three of the USAR officers are presently serving on active duty; that two of' the USAR officers are retired and have not requested return to active duty; and that one of the RA officers was recom mended for promotion to LTC, AUS, by the 1975 AUS, APL, CH and WAC promotion selection board and is presently serving in that grade;

c. that based upon the proceedings of the Board for Correction of Military Records of 10 December 1975, as approved by the Secretary of the Army on 28

January 1976, and pursuant to his directive of the same date, a reconstituted 1974 APL, CH and 14AC promotion selection board for promotion to LTC, AUS, was convened on 4 May 1976 with an appropriate number of Reserve Officers on the panel of the board, and adjourned on I June 1976; and

d. that on 29 June 1976, Deputy Chief of Staff for Personnel advised this Board pertinently that the applicants were reconsidered for temporary promotion to the grzide of LTC under the original criteria of the primary zone of the 1974 selection board by the reconstituted selection board convened in accordance with the Secretary's directive; and that the applicants had been recommended for promotion to LTC AUS, by the 1974 reconstituted promotion selection board that adjourned on 1 June 1976.

THE BOARD CONCLUDES:

1. That in light of the fact that the applicants were recommended for promotion tender the 1974 selection criteria for promotion to LTC, AUS, by a properly reconstituted APL, CH and WAC promotion board, had the applicants' records been reviewed by a properly constituted APL, CH and WAC selection board in 1974, it is reasonable to presume that they would have been selected for promotion at that time.

2. That based on the foregoing conclusion, it is also reasonable to presume that had the applicants been properly selected for promotion in 1974, they would have been promoted in the AUS at the time of their initial eligibility therefor.

3. That in view of the unusual circumstances surrounding this matter, the interest of justice would

be best served by now changing the applicants' records to show that they were promoted to the grade of LTC, AUS, on their appropriate promotion eligibility dates.

4. That in consideration of the foregoing findings and conclusions, failure of the applicants to obtain timely promotion has worked, and continues to work injustice upon them by depriving them of increased pay and allowances which their contemporaries with like qualifications have eceived..

THE BOARD RECOMMENDS:

That all of the Department of the Army records of the following named individuals be corrected to show that each was promoted to the grade of Lieutenant Colonel, Army of the United States, on the respective date shown:

NAME	SOCIAL SECURITY	DATE OF RANK	EFFECT DATE
BARRATT, RICHARD H.	520-42-5024	04/09/74	01/10/74
BERG, WILLIAM E. JR.	432-70-6090	03/06/74	01/08/74
BOLIARIS, DANIEL F. JR.	361-28-8698	03/07/74	01/08/74
BOSTANCIC, JAMES F.	201-24-2969	05/06/74	01/08/74
DILL, CLARK D.	224-40-5564	03/08/74	01/09/74
DYER, PETER M.	023-26-3472	10/06/74	01/08/74
ELLISON, WILLIAM E.	147-28-6037	02/10/74	01/11/74
GARFORD, WILLIAM W.	232-54-5022	03/08/74	01/09/74
GARDAR, LEONARD E.	285-28-5595	02/06/74	01/08/74
GEORGE, DANNIE E.	462-50-3922	07/06/74	01/08/74
GREENE, EARNEST L.	258-48-0313	02/07/74	01/08/74
GRIFFITHS, ALLYN C.	234-56-4534	10/07/74	01/08/74
HATTLER, ROBERT M.	282-32-9291	14/06/74	01/08/74
HUNTER, VICTOR D.	263-46-3927	13/06/74	01/08/74

JOHNSON, RICHARD A.	391-26-3520	05/06/74	01/08/74
JONES, ROLAND A	232-52-3133	04/09/74	01/10/74
KALEY, PETER M.	084-26-5932	04/06/74	01/08/74
KERNAN, MICHEAL F.	409-54-2564	03/07/74	01/08/74
LUCKER, HARRY A.	463-48-8567	04/06/74	01/08/74
McCARTHY, EDWARD W.	125-28-6638	05/06/74	01/08/74
NILSSON, JOHN A.	528-40-1098	16/06/74	01/08/74
NORTON, GEORGE T.	144-22-9148	07/03/75	01/04/75
PARMAN, DONALD W.	535-30-3468	12/06/74	01/08/74
PASSAILAIGUE, EDWARD	408-50-9891	02/06/74	01/08/74
PHILLIPS, DONALD J.	524-30-1668	07/04/75	01/05/75
SCHMIDT,PETER B.	398-30-4341	06/12/74	01/01/75
STERNE, JACK K.	478-36-5480	05/06/74	01/08/74
TISON, WILLIAM C.	267-44-4573	02/06/74	01/08/74

s/GORDON M. HOBBS
CHAIRMAN

APPENDIX A2--US ARMY MESSAGE TRANSMITTED TO FIELD COMMANDERS AND STARS AND STRIPES ON JANUARY 28, 1976.

TO
AIG 7405
AIG 7405
AIC- 7166
AIG 7447
RUFYDEA/EIC STARS & STRIPES DARMSTADT GERMANY
RUADSSA/EIC STARS & STRIPS TOKYO JAPAN
ZEN/AIG 9053 & 9054

BT

UNCLAS FOR INFORMATION. . . RELEASE HAS BEEN CLEARED FOR PUBLICATION AND/OR DISSEMINATION IN INTERNAL INFORMATION MEDIA BY OCINFO AND APPROPRIATE DA STAFF AGENCIES. ITS IMMEDIATE USE IN TROOP PAPERS IS AUTHORIZED.

SUBJ: CORRECTION OF MILITARY RECORDS

1. WASHINGTON D.C. JAN 28--SECRETARY OF THE ARMY MARTIN R. HOFFMANN ANNOUNCED TODAY THAT HE HAS APPROVED THE RECOMMENDATIONS OF THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (ABCMR) AND WILL GRANT ADDITIONAL PROMOTION OPPORTUNITIES TO SEVERAL HUNDRED FORMER OFFICERS WHO HAVE CHALLENGED THEIR NONSELECTION FOR PROMOTION IN 1974 AND 1975.

2. THE CHALLENGES ALLEGED VIOLATIONS OF STATUES AND PROMOTION REGULATIONS AS THEY WERE APPLIED TO THEIR PROMOTION

BOARDS.

3. THE ABCMR CONCLUDED THAT ARMY PROMOTION BOARDS WERE PROPERLY CONDUCTED AS TO 5 OF THE 6 ISSUES QUESTIONED. HOWEVER, IT ALSO CONCLUDED THAT "THE FAILURE OF THE DEPARTMENT TO APPOINT AN APPROPRIATE NUMBER OF RESERVE OFFICERS AS MEMBERS OF THE 1974 AND 1975 SELECTION BOARDS HAS RESULTED IN AN INJUSTICE TO THE APPLICANTS IN THAT IT DEPRIVED THEM OF CONSIDERATION FOR PROMOTION BY SELECTION BOARDS CONTAINING RESERVE OFFICERS."

4. BASED UPON THE CORRECTION BOARD'S RECOMMENDATION, MR. HOFFMAN HAS DIRECTED:

--THAT NEW SELECTION BOARDS WITH AN APPROPRIATE NUMBER OF RESERVE OFFICERS BE SEPARATELY CONVENED TO RECONSIDER ALL PRIMARY ZONE OFFICERS ORIGINALLY CONSIDERED BY THE 1974/75 SELECTION BOARDS FOR PROMOTION TO THE GRADES OF LIEUTENANT COLONEL, MAJOR, CHIEF WARRANT OFFICER (W-4) AND CHIEF WARRANT OFFICER (W-3). THE NEW BOARDS WILL RECEIVE THE SAME LETTERS OF INSTRUCTION AND GUIDANCE PREVIOUSLY FURNISHED THE CHALLENGED BOARDS FOR PRIMARY ZONE CONSIDERATION FOR SELECTION;

--THAT THE MILITARY RECORDS OF ALL ELIGIBLE PRIMARY ZONE OFFICERS AND WARRANT OFFICERS WHICH WERE PRESENTED TO THE CHALLENGED BOARDS BE APPROPRIATELY

RECONSTITUTED;

--THAT THE NEW BOARDS RECONSIDER ALL OFFICERS AND WARRANT OFFICERS WHO WERE PREVIOUSLY ELIGIBLE IN THE PRIMARY ZONE, AND MAKE RECOMMENDATIONS AS TO WHETHER EACH OFFICER SHOULD BE SELECTED OR MOT SELECTED; AND

- -THAT THE RECOMMENDATIONS OF THE NEW BOARDS WITH REGARD TO THOSE INDIVIDUALS PREVIOUSLY NONSELECTED BY 1974 AND 1975 SELECTION BOARDS BE REPORTED TO THE ABCMR FOR ITS USE IN CONSIDERING APPLICATIONS FOR RELIEF (OFFICERS AND WARRANT OFFICERS WHO WERE PREVIOUSLY SELECTED FOR PROMOTION UNDER THE ORIGINAL 1974/1975 SELECTION CRITERIA AND WHO WERE PROMOTED OR ARE AWAITING PROMOTION WILL NOT BE AFFECTED IN ANY WAY).

5. THE ADMINISTRATIVE PROCESSING NECESSARY TO CARRY OUT THIS DECISION WILL BE COMPLETED AS EXPEDITIOUSLY AS POSSIBLE. APPLICANTS TO THE ABCMR WHO WERE SEPARATED FOLLOWING THEIR NONSELECTION WILL BE RECALLED TO ACTIVE DUTY DURING PROCESSING.

6. CONCURRENTLY WITH THIS DECISION REGARDING THE 1974/75 BOARDS CONSIDERED BY THE ABCMR, SECRETARY HOFFMAN HAS DIRECTED THAT THE ARMY STAFF RECONSTITUTE THE BOARDS OF OFFICERS CONSIDERED BY THE TEMPORARY AUS PROMOTION BOARDS WHICH WERE CONVENED SUBSEQUENT TO THE LAST BOARD ADDRESSED BY THE ABCMR

RECOMMENDATIONS. THESE RECORDS WILL THEN BE AVAILABLE SHOULD ANY OFFICER CONSIDERED BY THESE BOARDS MAKE APPLICATION TO THE ABCMR FOR CORRECTIVE ACTION.

END OF NEWS RELEASE.

APPENDIX B--FIRST COURT OF APPEALS OPINION DATED OCTOBER 29, 1992

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91-8893
Non-Argument Calendar

D. C. Docket No. 1:88-cv-727-MHS

ROLAND A. JONES,

Plaintiff-Appellant,

versus

SECRETARY OF THE ARMY, DEPARTMENT OF THE ARMY, ARMY BOARD FOR THE CORRECTION OF MILITARY RECORDS, TOTAL ARMY PERSONNEL AGENCY, JOHN W. MATTHEWS and KARL BIELENBERG, individually and in their capacity as Executive Secretary for the Army Board for Correction of Military Records,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia (October 29, 1992)

Before TJOFLAT, Chief Judge, HATCHETT and DUBINA, Circuit Judges.

PER CURIAM:

We affirm the district court's rejection of the claims for relief appellant, a retired army officer, presents pro se in this appeal. The district court properly dismissed appellant's Title VII claims of employment discrimination, see 42 U.S.C. SS 2000e - 2000e-17, because Title VII is inapplicable to members of the Armed forces. *Stinson v. Hornsby*, 821 F.2d 1537, 1539 (11th Cir. denied, 488 U.S. 959, 109 S.Ct. 402 (1988). The 1987), cert. denied, 488 U.S. 959, 109 S.Ct. 402 (1988). The court also properly rejected appellant's claims under 42 U.S.C. SS 1981 and 1985 for the reasons set forth in the appellees' brief, at pp. 17-22.

Finally, the district court properly rejected appellant's claim that the Army Board for the Correction of Military Records (ABCMR), and its agency heads, failed to fulfill their duty of reviewing his complaints regarding the correction of his military records. specifically, he contends that ABCMR did nothing to correct the consequences of racial discrimination in his Officer Efficiency Ratings (OERs). We disagree. ABCMR's actions on appellant's application for correction of records were, as the district court concluded, appropriate and supported by substantial evidence. Although appellant referred extensively to studies of generalized discrimination in the Army, he failed to show that the ABCMR intentionally discriminated against him on account of his race. See *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1507 (11th Cir. 1988) (42 U.S.C. S 1981); *Baker v. McDonald's Corp.*, 686 F. Supp. 1474; 1481 (S.D. Fla. 1987), affld mem., 865 F.2d 1272 (11th Cir. 1988), cert. denied, *Hutchinson v. McDonald's Corp.*, 493 U.S. 812, 110 S.Ct. 57 (1989) (42 U.S.C. S 1985(3)); *Macintosh v. Arkansas Republican Party - Frank White Election Comm.*, 766 F.2d 337, 340

(8th Cir. 1985) (same). Appellant also contends that the ABCMR failed to act on the applications he made, in 1975 and 1976, to correct his records. As the district court observed, appellant reiterated the complaints made in these applications in the applications for correction of records he made in 1983-1985, and these complaints were properly addressed at that time. Accordingly, appellant could have sustained no prejudice from ABCMR's failure to act on his 1975 and 1976 applications and the denial of judicial relief was appropriate.

We find no error in the district court's handling of appellant's claims.

AFFIRMED.

APPENDIX C--SECOND COURT OF APPEALS OPINION FILED JULY 31, 1995

(DO NOT PUBLISH)
IN THE UNITED STATES COURT OF
FOR THE ELEVENTH CIRCUIT

No. 94-8256
Non-Argument Calendar
D. C. Docket No. 1:88-CV-727-MHS

ROLAND A. JONES,

Plaintiff-Appellant,

versus

SECRETARY OF THE ARMY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
(July 31, 1995)

Before TJOFLAT, Chief Judge, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

In *Jones v. Secretary of the Army* et. al, No. 91-8893i, slip op. (11th Cir. October 29, 1992) (Jones I), we affirmed the district we affirmed the district court's dismissal of appellant's "Title VII claims of employment discrimination, see 42 U.S.C. SS 2000e-2000e-17, because Title VII is inapplicable to members of the Armed forces. *Stinson v. Hornsby*, 821 F.2d 1537, 1539

(11th Cir. 1987), cert. denied, 488 U.S. 959, 109 S.Ct. 402 (1988)." We also affirmed the district court's rejection of "appellant's claims under 42 U.S.C. SS 1981 and 1985 . . . .11 and his claim "that the Army Board for the Correction of Military Records (ABCMR), and its agency heads, failed to fulfill their duty of reviewing his complaints regarding the correction of his military records." We said that "ABCMR's actions on appellant's application for correction of appropriate and supported by substantial records were . . . appropriate and supported by substantial evidence."

On January 7, 1993, following the issuance of our mandate in Jones I, appellant moved the district court pursuant to Fed.R.Civ.P. 59(d) for a new trial on his sections 1981 and 1985 claims, and pursuant to Fed.R.Civ.P. 60(b)(1-3) for relief from the district court's final judgment of September 30, 1991. Both motions were clearly untimely; accordingly, the district court denied them. The court also denied as meritless appellant's Fed.R.Civ.P. motion for sanctions against appellees' counsel. Appellant now appeals these rulings. In addition to challenging merits of the district court's disposition of his motions, however, appellant raises a plethora of issues that have nothing to do with whether the district court should have rejected appellant's post appeal motions as untimely. We consider none of those issues. We consider only the district court's disposition of appellant's Rule 59(d) and 60(b)(1-3) motions. As for those motions, the district court took the only action it could; it rejected them.

AFFIRMED.

APPENDIX D--REDACTED MAGISTRATES' RECOMMENDATION DATED JANUARY 10, 1989.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROLAND A. JONES,
Plaintiff,
V.

CIVIL ACTION
NO.1:88-cv-727-MHS

SECRETARY OF THE ARMY, NO. THE DEPARTMENT OF THE ARMY, THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS AND THE TOTAL ARMY PERSONNEL AGENCY (PROVISIONAL), MR. JOHN W. MATTHEWS, AND MR. CARL BIELENBERG, Individually and in their capacities as Executive Secretaries for the Army Board for Correction of Military Records,
Defendants.

MAGISTRATE'S REPORT AND RECOMMENDATION

(Redacted)

In suits against the United States Army similar to the case at bar, the United States Supreme Court and the Circuit Courts have not analyzed the contention that these actions are barredon the ground that the Army and the Secretary of the Army, as agents of the United States, were immune from suit. See e.g. *Wallace v.*

Chappell, 426 U.S. 296 (1983); *Gonzalez v. Dept. of the Army*, 718 F. 2d 926 (9th Cir. 1983); *Johnson v. Alexander* 572 F.2d 1219 (8th Cir.) , cert. denied 439 U.S. 986 (1978) *Bowers v.Campbell*, 505 F.2d 1155 (9th Cir. 1974). The courts are more likely to hold that claims against the United States Army are non-reviewable, or dismiss the case after applying analysis as set forth in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). *Chappell v. Wallace*, 426 U.S. 296; *Gonzalez v. Dept. of-the Army*, 718 F.2d at 929. The magistrate will review plaintiff's claims with this analysis in the following section, but would follow the general trend of the courts not recommend dismissal against defendants solely on the basis of sovereign immunity.

Defendant also contends that the individually sued def endants are absolutely immune from suit because both Matthews and Mr. Bielenberg were performing the official duties of the ABCMR Executive Secretary and the ABCMR is concerned with highly discretionary functions involving review of military records for evidence of "error or injustice" pursuant to 10 U.S.C. 1552.

Plaintiff disputes this claim and shows that it has been held under 10 U.S.C. 552 that discretionary practices by the ABCMR are impermissible. See *Baxter v. Claytor*, 652 F.2d 181 (D.C. Cir. 1981). Plaintiff has stated in his complaint that the ABCMR had a non-discretionary, judicially enforceable duty pursuant to 10 U.S.C. 1552 to act in 1974, 1975, and 1976 on five applications for the correction of his record.

The Supreme Court holds that absolute immunity for non-discretionary function finds no support in the

traditional justifications for official immunity, for:

> (1) The central purpose of official immunity--promoting effective government--would not be furthered by omission of a discretionary conduct requirement, because when an officials conduct is not a product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct.

Westfall v. Erwin, U.S. , 108 U.S. 580, 584; 98 L.Ed. 619 (1988).

The magistrate is persuaded by plaintiff Is argument and the argument in *Baxter v. Claytor*, that the functions of Mr. Matthews and Mr. Bielenberg were possibly non-discretionary.

(Redacted)

The Supreme Court in *Chappell v. Wallace*, 426 U.S. 296 concluded that a *Mindes* review is not required in suits which are involved with military officer--subordinate relationships.

(Footnote redacted)

The court held that no *Bivens* remedy is available for injuries that "arise out of or in the course of activity incident to service." The Supreme Court in Chappell clearly decided that enlisted military personnel may not maintain suit to recover damages from a superior officer for alleged constitutional violations. The court has "long recognized" two systems of justice: One for civilians and one for military personnel. The need for unhesitating and decisive military action by

military officers and equally disciplined responses by enlisted personnel would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. *Chappell v. Wallace*, 462 U.S. 296. A more recent decision, *United States v. Stanley*, U. S. , 107 S.Ct. 3054, 97 L.Ed. 550 (1987) reinforces the *Chappell* decision that the "special factors counseling hesitation "and the "unique disciplinary structure of the military establishment and Congress' activity in the field" dictate against suit for damages against the military structure and superior officers. *Chappell v. Wallace*, 462 U.S. at 304; see also *United States v. Stanley* 97 L.Ed.2d 550 (1987).

(Redacted)

However, in *Chappell*, the United States Supreme Court also stated that the military system provides for review and remedy of complaints and grievances such as those presented by the enlisted officers. The Court found that the Board for Correction of Naval Records provided means in which an aggrieved member of the military "may correct any military record when the Secretary of the Navy, acting through the Board, considers it necessary to correct an error or remove an injustice." *Chappell v. Wallace*, 462 U.S. at 303; 10 U.S.C. 1552(a). The Court stated:

> Under the Board's procedures, one aggrieved as respondents claim may request a hearing; if the claims are denied without a hearing, the Board is required to provide a statement of its reasons. 32 C.F.R. 723.3(e) (2),(4),(5), 723.4, 723.5 (1982). The Board is empowered to order retroactive back pay and retroactive promotion. 10 U.S.C. 1552(c). Board

decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence. See *Grieg v. United States*, 226 Ct. Cl. 2581 640 F.2d 1261 (1981), cert. denied 455 U.S. 907 (1982); *Sanders v. United States*, 219 Ct. Cl. 285, 594 F.2d 804 (1979).

Chappell v. Wallace, 462 U.S. at 303. Thus, the Supreme Court has allowed judicial review of determinations by the Board of Correction of Military Records. Plaintiff has alleged due process violations by the ABCMR and has specif ically alleged certain acts by Mr. Matthews and Mr. Bielenberg, as Secretary of the ABCMR, which may be reviewable by this court.

(Redacted)

SO REPORTED AND RECOMMENDED, this 10th day of January, 1989.

/S/ John E. Dougherty
JOHN E. DOUGHERTY
UNITED STATES MAGISTRATE

APPENDIX E--DISTRICT COURT ORDER DATED SEPTEMBER 27, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROLAND A. JONES,
Plaintiff,

CIVIL ACTION
1:88-cv-727-MHS

V.

SECRETARY OF THE ARMY, et al.,
Defendants

ORDER

Plaintiff Roland A. Jones ("Jones") is a black male who was a member of the United States Army from June 1, 1959, until September 30, 1980. He was forced to retire after obtaining the rank of lieutenant colonel because he was not qualified for further promotion. Plaintiff claims that his forced retirement resulted from a systematic policy of denying black officers the assignments necessary to qualify for promotion. Discrimination claims based on that alleged policy encompassed the majority of plaintiff's original complaint; however, those claims were dismissed in orders dated October 17, 1988, and April 28, 1989.1 Those decisions did not preclude Jones from

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1 Plaintiff's Title VII claims were dismissed in the October 17, 1988, Order because Title VII does not apply to the military. See *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987), cert. denied, 109 S.Ct. 402 (1988). Plaintiff's institutional discrimination claims were dismissed in the April 28, 1989, Order because judicial review of his assignments within the military would constitute unacceptable interference with the military function. See *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983); *Gillicran v. Morgan*, 413 U.S. 1 (1973); *Orloff v. Willoughby*, 345 U.S. 83 (1953).

pursuing claims against the Army Board for the Correction of Military Records ("ABCMR") for failing to act upon his applications for correction of alleged errors in his military record and against the ABCMR, John W. Matthews ("Matthews"), and Karl Bielenberg ("Bielenberg") for refusing to correct alleged errors in his military record in violation of 42 U.S.C. 1981 and 1985. These remaining claims were addressed by the Court in its July 5, 1991, Order, in the context of defendants' motion for summary judgment. The Court granted defendants' motion for summary judgment on plaintiff's 1981 and 1983 claims and deferred ruling on defendants' motion for summary judgment on plaintiff's remaining claims pending receipt of additional information from the parties. The remaining portion of defendants' motion for summary judgment is now before the Court and, for the reasons stated below, the Court will grant the motion.

DISCUSSION

In its July 5, 1991, Order, the Court concluded that plaintiff had failed to provide the Court with any evidence to substantiate his claim that the ABCMR's failure to act upon his 1974, 1975, and 1976 applications for correction of his military record was motivated by racial animus in violation of 1981 and 1985. Id. at 6. The Court noted, however, that it still needed to address plaintiff's very serious allegation that the ABCMR had failed to follow its own regulations, whatever the motivation of its members, in failing to act upon these applications.2 Id. at 6-7.

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2 As noted earlier, the Court was not able to dispose of this claim "because the record, though voluminous, failed to provide the Court with certain essential information," Order dated July 5 1991, at 7, information which the Court then directed the parties to provide, id. at 8, and which has since been provided to the Court.

The Court further noted that, although plaintiff alleged that he had submitted a total of seven "applications" to ABCMR during 1974, 1975, and 1976,

> the documentation provided by plaintiff suggests that Only plaintiff's 1975 "applications" were properly submitted to and were, in fact, received by the ABCMR. Title 32 C.F.R.581.3(c)(1)(i) provides that an "application for correction should be submitted on DD Form 149 (Application for Correction of Military or Naval Record)." Plaintiff's 1974 "application" is an extract from a complaint while plaintiff's 1976 applications are, respectively, an Inspector General Action Request and a letter to the ABCMR regarding the status of plaintiff's applications. None of these "applications" is an application within the meaning of 32 C.F.R. 581.3(c)(1)(i).

Order dated July 5, 1991, at 6. Having reviewed the record once again, the Court sees no reason to alter this initial conclusion - with one exception, however. According to a April 19, 1976, letter from the Inspector Generals Office, plaintiff's March 18, 1976, Inspector General Action Request was forwarded to the ABCMR "for consideration." See Exhibit T to Plaintiff's Complaint. The Court must assume, therefore, in the context of defendants' motion for summary judgment, that the Request was sent to and received by the ABCMR.

The Court notes at the outset that it appears that the undisputed facts indicate that the ABCMR acted upon the aforementioned 1975 and 1976 "applications" in a manner consistent with its regulations. See Administrative Record ("AR") at 699-719; Defendants'

Brief in Response to order dated July 5, 1991, at 7-9. It is clear, in any event, that even if the ABCMR did not act upon these applications, the ABCMR's failure to act - the violation of its regulations - was not "prejudicial" to plaintiff. See *Cruz-Casado v. United States*, 553 F.2d 672, 675 (Ct.Cl. 1977).

On June 29, 1983, April 25, 1984, and March 27, 1985, the ABCMR issued three decisions in response to, respectively, plaintiff's initial application for correction of his military record and two subsequent requests for reconsideration of the ABCMR's initial decision. Exhibit A to Defendants' Motion to Dismiss filed on June 6, 1988. In its June 29, 1983, decision, the ABCMR concluded that there was insufficient evidence

> to support the applicant's allegation that he was not afforded an equal opportunity in pursuit of his career, or that he was malassigned and consequently not promoted because he was black . . . [or] that the questioned OERs contained racially motivated statements or that they were not representative of his capacity, efficiency and value at the time they were written.

Id. The ABCMR also concluded, however, that a certain ambiguous phrase in plaintiff's OER for the period August 1, 1972, to July 2, 1973, should be

---

3 The Court concluded in its July 5, 1991, Order, that "there is no evidence that [these decisions] were not supported by 'substantial evidence' or were motivated by the racial, class-based 'invidiously discriminatory animus' necessary to give rise to a civil rights claim." Id. at 6 (citations-omitted).

removed and, in light of the erroneous filing of certain documents, that plaintiff should be reconsidered for promotion to LTC, RA, by a Special Selection Board ("SSB") using 1979 and 1980 selection criteria. Id. Plaintiff was then twice considered for promotion by two SSBs and each time the Secretary of the Army approved the SSB's decision not to recommend plaintiff for promotion. AR at 87.

The Court's review of the ABCMR's June 29, 1983, April 25, 1984, and March 27, 1985, decisions indicates that, on each occasion, the ABCMR was presented with and addressed the same issues and concerns presented by plaintiff in the 1975 and 1976 applications allegedly not acted upon by the ABCMR.3 It goes without saying, therefore, that the ABCMR's alleged failure to act upon plaintiff's these applications could not have resulted in prejudice to plaintiff.

CONCLUSION

Accordingly, for the reasons stated above, the Court GRANTS defendants' motion for summary judgment on plaintiff's remaining claims in this matter.

IT IS SO ORDERED, this 27th day of September , 1991.

/s/ Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

APPENDIX F--LETTER, SECRETARY OF THE ARMY, DATED FEBRUARY 28, 1985:

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310
28 FEB 1985

SFMR
JONES, ROLAND A.
232-52-3133

LTC Roland A. Jones
AUS, Retired
1390 Heatherland Drive
Atlanta, Georgia 30331

Dear Colonel Jones:

I am in receipt of your letter of February 6, 1985. I specifically reject any offer you might be trying to convey, and refuse to discuss settlement in any respect.

Your recourse is to a federal court of competent jurisdiction.

Sincerely,

/s/ John W. Matthews
John W. Matthews
Deputy Assistant Seceretary
(DA Review Boards, Personnel
Security and Equal Employment
Opportunity Compliance and Complaints Review)

APPENDIX G--LETTER, CLERK U.S. COURT OF APPEALS, DATED OCTOBER 26, 1995, WITH JUDGMENT DATED JULY 31, 1995:

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Number Clerk

In Replying Give
Of Case And Names Of
Parties

October 26, 1995

Luther D. Thomas ATL
Clerk, U.S. District Court
2211 U.S. Courthouse, 75 Spring St., SW
Atlanta, GA 30335

RE: 94-8256 Jones v. Secretary of the Army
DC DKT NO.: 88-00727 1-CV-MHS

The enclosed certified copy of the judgment and a copy of this court's opinion are hereby issued as the mandate of this court.

Also enclosed are the following:

*** Original Exhibits, consisting of one envelope**
*** original record on appeal or review, consisting of ten volumes**

Please acknowledge receipt on the enclosed copy of this letter.

Sincerely,

/S/ Miguel J. Cortez
MIGUEL J. CORTEZ, Clerk

Encl.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 94-8256
Non-Argument Calendar
D. C. 'Docket No. 1:88-cv-.727

ROLAND A. JONES,

Plaintiff-Appellant

versus

SECRETARY OF THE ARMY, et al.,

Defendants-Appellees.

Appeal from the United States Digtrict Court
for the Northern District of Georgia

Before TJOFLAT, Chief Julge, DUBINA
and.BARKETT, Circuit Judges.
JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on filrt, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the orders of the said District Court appealed from in this cause be and the same are hereby AFFIRMED;

It is further ordered that plaintiff -appllant pay defendants- appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 31, 1995
For the Court: Miguel J. Cortez, Clerk

By /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 10/26/95

APPENDIX H-- ORDER, DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS, FILED SEPTEMBER 29, 1995.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 94-8256

FILED
U.S COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 29 1995
MIGUEL J. CORTEZ
CLERK

ROLAND A. JONES,
Plaintiff-Appellant

versus

SECRETARY OF THE ARMY, et al.,

Defendant,-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

BEFORE: TJOFLAT, Chief Judge, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is Denied.

ENTERED FOR THE COURT:

/S/ GERALD TJOFLAT
UNITED STATES CIR UIT JUDGE

ORD-41

APPENDIX I--US ARMY'S BUTLER STUDY, DATED JULY 31 1975:

INFORMATION PAPER
DAPE -HRR
3 1 JUL 1375

SU'BJECT: Officer Efficiency Report (OER) Analysis (The "Butler Study")

PURPOSE. To provide information concerning a comparative numerical analysis of OER scores received by black and white officers during the period December 1956 to December 1971, and durina the period 1 Jan 73 to 30 Jun 75.

FACTS.

1. A "study" was conducted by LTC D. R. Butler in 1972 which provided a comparative numerical analysis of OER scores received by black and white officers during the period 31 December 1956 to 31 December 1971. No general officer reports were analyzed.

2. LTC Butler was an action officer at the US Army Military Personnel Center OIILPERCEN). By extracting data from the MILPERCEN automated data system, he compiled comparative OER statistics on black and white officers. This information was converted to vu-graphs ard incorporated into several different briefings. There-was no formal written "study" as such.

3. Three OER forms were in use during the fifteen-year period: OER 67-4 (31 Dec 56-29 Sep 61); OER 67-5 (30 Sep 61-31 Star 68); and OER 67-6 (1 Apr 68-31 Dec 72). In the case of OER 67-6, reports after 31 Dec 71

were not included in the analysis.

4. The scores of all OER's from the data banks of the Inquiry and Report Generator System (IRCS) and the Management Information System (MIS) were tabulated. For OER's 67-4 and 67-5, the systems included all scores of officers currently on active duty. For,OER 67-6, the system did not include all colonels, nor did it includeofficers currently on active duty who had less than eight years of active commissioned service or who were not promotable to major. Because of this, for the OER 67-6 analysis, colonels were not included, and junior officers were considered using random sampling techniques. In addition, it should be noted that the OER's of oficicers released fron, active duty because of low OER's or who had resigned or retired were not considered. Results of the study are at Tab A.

5. It is important to note in analyzing the data that the populations represented by the perqentage tabulations for each OER form at Tab A are listed under-the rank held at the time the study was conducted and not the rank'held when they actually received the OER. In other words, the LTC's listed under OER 67-6 are exactly the same group of people listed under LTC's for OER 67-4 even though probably not LTC's at the time this particular OER was in effect.

5. A recurring phenomenon revealed by the study is that a significantly larger percentage of black officers received scores on the lower end of the OER spectrum than did white officers. Conversely, a significantly larger number of white officers received scores on the upper end of the OER spectrum than did black officers.

6. A second apparently recurring phenomenon appears to be that as the same black officer advances in grade, his OER tends to become more comparable to the OER of a white officer. For instance, a black LTC has had his OER's tabulated under "LTC's" for each of the three OER forms listed at Tab A. As the OER forms grow more current, the disparity in scores between the same white and black officers decreases.

7. Personnel management officials at Headquarters, Departraent of the Army, accepted the general conclusion from the-numerical analysis at Tab A that historically black officers received lower numerical ratings on OER's than did xqhite officers. As a result of this disparity, a mechanism was established in January 1973 for methodically tracking the difference. The comparative black and white officer OER scores for the period I Jan 73-31 Dec 73 and for the period 1 Jan 73-30 Jun 75 are at Tab B. 'Ilie overall trend indicates equalization among black and white warrant officers and a continuing, but lessening, gap in the c-tiissioned officer ranks.

8. 'In addition to OER score monitoring by race, the following specific actions have been taken:

a. The mechanism for tracking comparative OER scores by race has been integrated into the DA Affirmative'Actions Plan.

b. All officer promotion and school. selection boards are briefed on the general results of the "Butler Study" concerning the disparity in scores.

c. All noncmissioned officer promotion boards are also briefed on the general results of the analysis.

This was done because an assumption was made that the same phenomenon of disparity in scores existed in the Enlisted Efficiency Report System.

d. A minority representative was placed, as a matter of policy, on all such boards.

e. The general conclusions of the "Butler" analysis were released to all major command representatives at the January 1974 DA Worldwide Race Relations/Equal Opportunity Conference held at Fort Monroe, Virginia.

9. There are probably a number of reasons for the disparity in scores. LTC Butler, during the course of his analysis, attempted to isolate some possible factors such as source of commissioning, education level, and related kinds of things. This effort did not result in any meaningful patterns. When LTC-Butler reported the results of his analysis, DA Personnel Personnel Manacement officials concluded that no specific reasons could be clearly pinpointed as causes of this disparity. They, as well as present officials, strongly suspected that a large part of the disparity ,was the result of a variety of forms of discriminating practices and outlook, some conscious and scme uncoiscious, occurring within the Army and possibly before individuals entered the Army. The cumulative effects of these practices and attitudes over a long period of time can be best measured statistically as is now being done as a partial basis to identify areas for correction.

10. The Department of the Army's Affirmative Actions Plan (AAP) addresses not only the Officer Efficiency Report situation but establishes mechanisms for improving the upward mobility opportunities of

minorities, both officer and enlisted, over the entire spectrum of personnel functions including procurent, individual training, classification, promotion, evaluation, utilization and separation. In addition, the AAP has established a methodology for measuring progress so that Army managers may take relatively precise corrective action where disparities in treatment are identified. A copy of the AAP is at Tab C.

APPENDIX J-- PASSOVER LETTER, JULY 9, 1974.

26 BMR 14 OCT 77 (Date transferred from paper record to Microfilm record)

-PAP-PO (3 MAY 1974) 9
July 1974

SUBJECT: Notification of Temporary Promotion Status

Major Roland A. Jones 232-52-3133, INF
HQ, USA Forces Command
Fort Mcpherson, GA 30330

1. A Department of the Army Promotion Selection Board convened recently to consider officers of your grade for temporary promotion. You were among those officers considered but not selected. This non-selection constitutes a passover as defined in AR 624-100.

2. The board impartially considered the record of each officer under consideration. Apparently the selection board decided that you were not as well qualified as others considering the limited number which could be selected. The recommendations of the board are final, and the reasons for selection or non-selection cannot be divulged.

3. Provided you are eligible as specified in AR 624-100, you will be considered by the next consecutive selection board for the higher grade involved. The next board will be composes of entirely different members.

BY ORDER OF THE SECRETARY OF THE ARMY:

Signed
Robert S. Bell
Colonel, USA
Deputy for Personnel Services

Copy furnished:
Career Branch Concerned

PERMANENT

File in Officers Section
Pers, Rec. Br.
E.G. Jackson

APPENDIX K-- PASSOVER LETTER, AUGUST 12, 1975.

26 BMR 14 OCT 77 (Date transferred from paper record to Microfilm record)

DAPC-PAP-PO (12 May 75)

SUBJECT: Notification of Temporary Promotion Status 12 Aug 1975

Major Roland A. Jones 232-52-3133, INF
HQ, USA Forces Command
Fort Mcpherson, GA 30330

1. A Department of the Army Promotion Selection Board convened on 15 April 1975 to consider officers for temporary AUS promotion to lieutenant colonel under the provisions of AR 624-100. You were among the officers considered, but unfortunately the board did not recommend you for promotion. The requirement to reduce the strength of the officer corps has limited the number of promotions and has resulted in the inability to select many highly qualified officers with fine records.

2. The board examined the entire record of each officer on an impartial basis. Factors such as the following were considered: performance reflected by efficiency reports, civilian and military education training, type and variety of assignments, and future potential. Your nonselection is not meant to reflect unfavorably upon your performance of duty or the contribution you are making to today's Army. Hopefully, you will not allow this disappointment to discourage you from continuing to put forth your best

effort.

BY ORDER OF THE SECRETARY OF THE ARMY:

Signed
ROBERT S. BELL
Colonel, GS
Deputy for Personnel Services

Copy furnished:
Career Management Division

PERMANENT

File in
Officer Section
Pers, Rec. Br.

APPENDIX K2--MANDATORY RETIREMENT LETTER.

DEPARTMENT OF THE ARMY
U.S. ARMY MILITARY PERSONNEL CENTER
200 STOVALL STREET
ALEXANDRIA. VIRGINIA 22332

DAPC-MSS-RS
5 May 1980
Jones, Roland A., 232-52-33133

SUBJECT: Retirement

THRU: Commander
US Army Forces Command
ATTN: ADCSOP
Fort McPherson, GA 30330

TO: Lieutenant Colonel Roland A. Jones, Inf

1. A Department of the Army, Regular Army, promotion selection board recently convened to consider majors for permanent promotion to lieutenant colonel. You were among those officers considered; however, the board did not recommend your promotion. This is your second nonselection and in accordance with paragraph 4-27a (1), AR 635-100 your name must be removed from the active list of the Regular Army. Accordingly, you must be placed on the retired list effective October 1980, unless voluntary retirement is requested.

2. Paragraph 4-10 AR 635-100 permits you to request voluntary retirement on the same effective date (1 Oct 80) as your mandatory date, if desired. There is little difference between a voluntary retirement and

mandatory retirement. Retirement benefits and all administration pertaining to retirement (certificates, orders, etc.) are identical. In some states, if a person is mandatorily retired, unemployment compensation may be authorized, while it would not be for a person who voluntarily retired. Your local state unemployment insurance office could provide further details. If you elect to retire voluntarily on or before your mandatory date your voluntary application should be prepared in accordance with Section II, Chapter 49 AR 635-100, and submitted to arrive at this headquarters, ATTN: DAPC-MSS-RS, 60 days prior to your requested retirement date. If you decide not to apply for voluntary retirement, you should forward your preretirement information in accordance with paragraph 4-23, AR 635-100 by 1 July 1980.

3. Early arrival of your voluntary application or your preretirement information, as appropriate, will be to your advantage since it will permit timely issuance of your orders. Neither your household goods nor dependents can be moved at Government expense prior to issuance of your orders.

4. Although a medical examination is not required for retirement purposes, you are encouraged to have one. It should be scheduled not later than four months prior to your retirement date to ensure completion as the law does not permit us to retain an officer on active duty for the purpose of completing a medical examination. Your personnel officer and medical examining authorities will assist in the scheduling and timely completion of your medical examination.

5. Information pertaining to computation of your service and retirement pay is inclosed to assist you in

your retirement planning. Your local commander will give you a copy of DA Pamphlet 600-5, Handbook on Retirement Services for Army Personnel and Their Families, which will be helpful to you.

6. This headquarters, (ATTN: DAPC-MSS-RS, Autovon 221-8753) will assist with any problems or questions that may arise pertaining to your retirement, which cannot be resolved locally.

7. Your many years of dedicated service are appreciated, and the Army wishes you every success in your future endeavors.

BY ORDER OF THE SECRETARY OF THE ARMY:

1 Incl
As stated

/s/ JAMES A. WINDSOR
Colonel, GS
Chief, Personnel
Management
Support Division

Copy furnished:
DAPC-OPL

APPENDIX L-- ABCMR REQUEST THAT I FILE FOR RELOOK CONSIDERATION.

DEPARTMENT OF THE ARMY
U.S. ARMY MILITARY PERSONNEL CENTER
200 STOVALL STREET
ALEXANDRIA, VIRGINIA 22332

REPLY TO
ATTENTION OF:DAPC-MSS-PO

Major Roland A. Jones
HQ USA FORSCOM
Ft McPherson, GA 30330

Dear Major Jones:

As you may be aware, pursuant to a decision by the Secretary of the Army, new 1974 and 1975 Army of the United States (AUS) promotion selection boards to the grades of lieutenant colonel, major and chief warrant officer, CW3 and CW4, are being separately convened.

I am pleased to inform you that as a result of the recently convened 1974 LTC, AUS, APL, CW3 and CW4 Board which adjourned on I June 1976, you were recommended for promotion. This information has been reported to the Army Board for Correction of Military Records (ABCMR).

In view of this determination, you may be eligible for corrective action. Only the Secretary of the Army acting through the ABCMR may correct your Military records. Thus, if you have not already done so, you may desire to apply to the ABCMR for appropriate relief. A copy of AR 15-185 and two copies of DD Form

149 are inclosed in the event you choose to pursue this matter. If so, your application should be submitted without delay and should be as complete as possible in specifying the type and extent of relief desired, such as, promotion with appropriate DOR, restoration to active duty (if appropriate) with back pay and allowances, etc. In this regard, copies of your separation orders and documents should be included with your DD Form 149 or forwarded to the ABCMR if you have already submitted an application to the Board in order to facilitate expeditious processing.

If you have already filed an application (DO Form 149) with the ABCMR, (DD Form 149) with the ABCMR no further filing is required.

In the absence of an ABCMR application, no favorable personnel actions may be taken as a result of the new AUS promotion selection board's recommendation.

Sincerely

2 Inclosures
As stated

PAUL M. PAYSON
Colonel, GS
Chief, Personnel
Management Support
Division

APPENDIX L2-- RELOOK PROMOTION LETTER, SEPTEMBER 16, 1976.

26 BMR 14 OCT 77 (Date transferred from paper record to Microfilm record)

DEPARTMENT OF THE ARMY
U. S. Army Military Personnel Center
200 Stovall Street
Alexandria, Virginia 22332

Reply To
16 SEP 1976
Attention of: DAPC-MSS-PO (Relook)

SUBJECT: Correction of Military Records

LTC Roland A. Jones, 232-52-3133, IN
Student Det. USA C&GSC
Ft Levanworth, KS 66027

1. This is in further reply to your request for correction of your Army Records.

2. In accordance with the findings of the Army Board for Correction of Military Records, pursuant to the provisions of Title 10, United States Code, Section 1552, your Department of the Army records have been corrected to show that you were promoted to the temporary grade of Lieutenant Colonel on 1 October 1974. Request that you furnish your personnel officer a copy of this letter for file in your field military personnel records.

3. The Commander, U. S. Army Finance Accounting Center, Indianapolis, Indiana 46249, will advise you of any pay to which you may be entitled, without further

inquiry on your part.

BY ORDER OF THE SECRETARY OF THE ARMY:

Signed
LEROY LOHDON, JR.
Major, GS
Chief, Officer Promotions Section

1 Incl DAO 48-1, dated 8 Sep 76

Copies Furnished
SFMR, Pentagon
CDR, USA F&A Ctr

PERMANENT

APPENDIX M--REDACTED DEFENDANT, ABCMR'S, SECOND ADMISSION OF GUILT THAT THE ABCMR NEVER ACTED DURING 1975-76.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
ATLANTA DIVISION

ROLAND A. JONES,
Plaintiff,

CIVIL ACTION-NQ.
1-88-cv-727-MHS

v.

SECRETARY OF THE ARMY, et al.,
Defendants.

DEFENDANTS' SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT

In its January 10, 1991 order, the Court deferred ruling on defendants' Motion for Summary Judgment until after the plaintiff had the opportunity to refile his motion to compel, and the defendants were able to depose the plaintiff on information relating to plaintiff's remaining claims. Finally, the Court all materials in support or in directed both parties to file all materials in support or in opposition to defendants' motion for summary judgment within sixty Pursuant to this Court's Order days of the date of its Order. Pursuant to this Court's Order dated January 10, 1991, the following supplement to defendants, Motion for Summary Judgment is submitted.

(irrelevant matter omitted).

Factual Background

The undersigned Assistant U.S. Attorney contacted plaintiff equally applicable to this March 3, 1975 application because the action to be taken by the ABCMR did not include any corrections to the plaintiff's military records. (See Defendant's Exhibit 3.)

The plaintiff has also alleged that he filed two other applications in 1975, on February 28, 1975 and March 3, 1975, concerning the inclusion of extraneous copies of a 25/09/73 to 25/03/74 OER in his military record, and the cancellation of a school assignment to the Armed Forces Staff College (AFSC), respectively. Other than the plaintiff's representations that these two applications were filed, there is no corroborating evidence that these applications were ever received by the Board. They are never referred to in any of the correspondence or memoranda from the ABCMR. It is the plaintiff's burden to first prove that the ABCMR received his applications before this Court can determine whether the Board failed to properly consider and act on them. It is apparent that the Inspector Generals (IG) Office received copies of the applications dealing with the plaintiff's school assignment and extraneous copies of an OER in his file, (See Exhibits L and N to Exhibit 2.), but not the ABCMR. As evidenced by the Disposition Form dated 21 March 1975 forwarding only one of the plaintiff's applications dated 3 March 1975, apparently, only one 3 March application was received by the ABCMR. (See Exhibit H to Exhibit 2.) Additionally, it is equally plausible that the ABCMR did not respond or act upon plaintiff's remaining applications because the plaintiff had not completed

the exhaustion of his administrative remedies. (irrelevent matter omitted).

The plaintiff alleges as his last claim against the Board that it discriminated against him by failing to act on its own volition to remove passover letters from his record as mandated by *Dilley v. Alexander*, 627 F.2d 407 (D.C. Cir. 1980.) The plaintiff has unjustifiably relied upon *Dilley*. *Dilley* does not stand for the proposition that all passover correspondence must be removed from an applicant's military record whenever it is put before any type of reconsideration or relook board. See *Greig*, supra, 640 F.2d at 1269. ("[m]erely because the Correction Board voids an OER, it is not automatically obligated to void any passover emanating from a selection board that had a defective OER before it.") The court in *Dilley* merely reaffirms the scope of review to be applied by the courts to review the decisions of the ABCMR, and specifically, to inquire whether an action of a military agency conf orms to the law, or is arbitrary, capricious, or contrary to the statutes and regulations governing that agency. *Dilley*, supra, at 920.

The suit in *Dilley* brought by several Army Reserve officers who had been released from active duty after non-selection by two promotion selection boards involved an illegally constituted selection board. The 1975 selection board which "passed over" the reserve officers was improperly constituted because it did not have an appropriate number of reserve off icers sitting as members as required by 10 U.S.C. 266. After their first passover in 1975, the *Dilley* plaintiffs filed applications with the ABCMR requesting that their records be adjusted to eliminate reference to

their non-selection by the improperly constituted promotion board. As a consequence of their applications the ABCMR recommended that the 1975 promotion boards be reconstituted with the proper membership. Before the recommendation for a reconstituted or "relook" board could be implanted the plaintiffs, records were reviewed by the 1976 promotion selection board. The plaintiffs' were "passed over" for a second time, arguably because the 1976 board considered the fact that the plaintiffs had already been previously passed over. The *Dilley* court determined that because the first board was illegally composed, plaintiffs had never been lawfully passed over. The court further decided that the second promotion board in 1976 was inherently tainted by the inclusion of any mention of a first passover because of the illegality of the first board. The charter and purpose of the proposed "Relook Board" was to essentially consider the plaintiffs' military records as they should have been in 1975. That required putting reserve officer representatives on the relook panel, and removing all references to any Passover, since in 1975 there would not have been any mention of a passover before a properly paneled promotion board.

In the plaintiff's case the promotion board which considered him for promotion to LTC, AUS was not illegal, and there were no statutory or regulatory deficiencies. Additionally, the plaintiff (irrelevant matter omitted).

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APPENDIX N--REDACTED DEFENDANT, ABCMR'S, FIRST ADMISSION OF GUILT THAT THE ABCMR NEVER ACTED DURING 1975-76.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
ATLANTA DIVISION**

**ROLAND A. JONES,
Plaintiff,**

v.

**CIVIL ACTION NO.
1:88-cv-727-MHS**

**SECRETARY OF THE ARMY, et al.,
Defendants.**

DEFENDANTS RESPONSE TO PLAINTIFFS FIRST REQUEST AND NOTICE OF REQUEST FOR PRODUCTION OF DOCUMENTS AND INFORMATION

Pursuant to Rule 34, Fed.R.Civ.P., the defendants provide the following responses to Plaintiff's First Request and Notice of Request for Production of Documents and Information.

1. There are no documents responsive to plaintiff's requests, numbers 1,2,3,4 and 5. The Army Board for Correction of Military Records (ABCMR) did not issue Memoranda of Consideration until 1981. Additionally, there is no record of the ABCMR receiving any valid applications from the plaintiff, consequently there was never a board constituted in the 1970's which reviewed the plaintiff's records.

(#2 and 3 irrelevant, omitted).

4. In request number 17(l) the plaintiff has requested a current mailing address for the membership of the ABCMR as it was constituted in 1974, 1975, and 1976. Documents listing the membership of lt ABCMR boards for the years 1974, 1975, and 1976 have not been maintained, and therefore cannot be provided to the plaintiff. Additionally, because the plaintiff's records were never reviewed by an ABCMR board in the listed years, the membership of those boards would be irrelevant to the issues in this action.

(#5 and 6 irrelevant, omitted).

Respectfully submitted,

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